



Law Society
of Scotland

Stage 1 briefing

National Care Service (Scotland) Bill

February 2024



Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The National Care Service (Scotland) Bill¹ was introduced by the then Cabinet Secretary for Health and Social Care, Humza Yousaf MSP, on 20 June 2022. The Health, Social Care and Sport Committee and other committees issued a call for views, to which we responded.² We also provided oral evidence as part of the Committee's Stage 1 consideration of the Bill on 1 November 2022.³ The Health, Social Care and Sport Committee's Stage 1 Report on the National Care Service (Scotland) Bill ('the Stage 1 Report')⁴ was published on 22 February 2024.

We welcome the opportunity to consider and provide comments on the Bill ahead of the Stage 1 debate scheduled for 29 February 2024.

General remarks

As noted in the Stage 1 Report, the Scottish Government's proposed approach towards the creation of a National Care Service (NCS) has changed substantially during the course of Stage 1 scrutiny of the Bill.⁵ We anticipate that many of the provisions of the Bill as introduced will be subject to amendments should the Bill proceed to Stage 2.

On this basis, whilst we have commented on specific provisions of the Bill later in this briefing, we have focused on identifying a number of key themes arising from our consideration of the Bill:

- The complex existing legislative framework
- Framework legislation and opportunities for parliamentary scrutiny
- Rights and duties

¹ [National Care Service \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#)

² [22-09-02-ncswg-ncs-bill-written-evidence.pdf \(lawscot.org.uk\)](#)

³ [Minutes for Health, Social Care and Sport Committee 30th Meeting, 2022 Tuesday, November 1, 2022 | Scottish Parliament Website](#)

⁴ [Stage 1 report on the National Care Service \(Scotland\) Bill | Scottish Parliament](#)

⁵ Stage 1 Report, para 115

- Consultation and co-design
- Resourcing
- Conflicts of interest

We would intend to comment further on the detail of any amended Bill at later stages of the parliamentary process.

We note the lead committee's concerns regarding the lack of detail available in relation to the Government's revised proposals⁶ and their calls for early sight of further information to enable effective ongoing scrutiny of the Bill.⁷ We also note the lead committee's view that the lack of detail has made their work in scrutinising the Bill less effective.⁸ We share these concerns. Our interest is in the creation of good law which is clear, effective, efficient and which achieves its objectives without unintended consequences. Effective scrutiny is a crucial element of the creation of good law. It is therefore essential that there be further clarity in both policy and drafting terms at an early stage, to allow for proper scrutiny and appropriate stakeholder engagement. Given the fundamental nature of the reforms proposed, the importance of full and robust scrutiny cannot be overstated.

Ultimately, we would welcome early clarity on how the revised approach will add value to the existing complex legal and organisational landscape, how it will interact with existing structures, and how it will improve outcomes for the end users of social care services.

Complex existing legislative landscape

Social work and social care services in Scotland operate within a complex landscape. There is a multiplicity of services and organisations fulfilling roles within the social care system. The social care sector is governed by a complex and overlapping legislative framework. It is important that any new legislation within this landscape is linked to a demonstrable public interest justification and leads to improved outcomes for the end users of social care services. New legislation must not simply add a further layer of complexity to an already complex operational environment.

The current legislative landscape would benefit from some rationalisation to improve clarity of what is currently a very complex and overlapping framework.

In our written evidence, we recognised:

- that the Independent Review of Adult Social Care (IRASC)⁹ recommended the creation of a NCS to achieve consistency, drive national improvement where required, ensure strategic integration with the

⁶ Stage 1 Report, para 104

⁷ Stage 1 Report, paras 108-110

⁸ Stage 1 Report, para 104

⁹ [Adult social care: independent review - gov.scot \(www.gov.scot\)](http://www.gov.scot/resources/documents/2016/06/Adult_social_care_independent_review.pdf)

NHS, set national standards, terms and conditions, and bring national oversight and accountability to what it termed a vital part of Scotland's social fabric.¹⁰

- that the Bill represents an important step in addressing the challenges identified by the IRASC¹¹ and in giving effect to the IRASC's recommendations that accountability for social care support should move from local government to Scottish Ministers, and that a National Care Service should be established in statute.¹²
- that 72% of respondents who responded to the question on the NCS in the 2021 consultation agreed that Scottish Ministers should be accountable for the delivery of social care, through a National Care Service.¹³

However, we highlighted that it was not clear:

- that the creation of a National Care Service in and of itself would lead to improved quality and consistency of social care services in Scotland.
- how any new bodies may be empowered to effectively drive change, or ensure effective implementation of individual rights in a social care context.
- how a National Care Service will interact with existing organisations, or what safeguards will be in place to ensure that current difficulties in social care are not simply replicated on a national level.
- how an effective transfer for services from local authorities to a National Care Service will be achieved in practice. Dividing services (for example if adult services are transferred in advance of children's services) may be very difficult where staff are integrated across them, and in light of the integrated and transitional services currently in place to support service users moving from children's services to adult services.
- how support services such as human resources, legal, IT and finance functions which are currently delivered by Local Authorities and Health Boards respectively for their respective services will be provided or funded by the proposed model.
- how and by whom staff will be employed, how property will be held and managed, and how care boards will be resourced.
- how a nationally-led approach will accommodate regional variations and be responsive to local needs, thereby striking a balance between the need for consistency and flexibility. Health care services are currently provided within a national framework by the NHS, but there remain opportunities for local prioritisation, as well as elements of inconsistency and regional variation in delivery by local health boards.
- what evidence there is that suggests that a national service will improve quality and consistency of services, particularly in light of the terms of the European Charter of Local Self-Government, and in

¹⁰ IRASC at page 5

¹¹ See para 28-32 of the Policy Memorandum, available at [Policy memorandum accessible \(parliament.scot\)](https://www.parliament.scot/policy-memorandum-accessible)

¹² IRASC, recommendations 15 and 16

¹³ See: [Supporting documents - National Care Service: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/supporting-documents-national-care-service-consultation-analysis), chapter 4

particular Article 4(3) which provides that “Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.”

- how existing statutory functions conferred by current legislation, including the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000 will operate within a National Care Service model.
- where the role of Chief Social Worker Office will sit in a National Care Service model. The CSWO role is currently placed on a statutory footing by the Social Work (Scotland) Act 1968 and the Public Bodies (Joint Working) (Scotland) Act 2014.

The Public Bodies (Joint Working) (Scotland) Act 2014 created a structure to facilitate better integration of, and joint working between, health and social care services. Health and social care integration appears to have been completely omitted from the Bill as introduced.

We note that the Scottish Government has now reached a consensus agreement with COSLA on shared legal accountability.¹⁴ We note the Scottish Government’s decision to no-longer proceed with plans for the creation of local care boards and to retain integration authorities in a reformed state, alongside the creation of a National Care Service Board as part of a revised governance structure.¹⁵ We understand that the Government intends to bring forward amendments to the Bill to reflect a revised approach to governance of the proposed NCS.

Whilst it remains to be seen whether such amendments will address the concerns we have set out above, we welcome the lead committee’s request for a clear overview of the detail of the reforms to integration authorities the Scottish Government intends to bring forward via amendments to the Public Bodies (Joint Working) (Scotland) Act 2014.¹⁶ Ultimately, the governance model must be transparent from the point of view of service users, and must make redress possible and accessible. We also reiterate our view that any changes, particularly any transfer of services with agreement, should be supported by a robust evidence base in order to provide clear information for the public on the basis for such change and as a basis for accountability.

We would welcome further clarity on the proposed role and powers of a National Care Service Board, particularly in relation to how the establishment of a new structure will add value within the already crowded legislative and organisational landscape, how it will interact with existing structures, and how it will deliver improved quality and consistency of social care services in Scotland. We would suggest that an organogram or similar would be of considerable assistance for future engagement and scrutiny. We note that Scottish Ministers already have certain powers in relation to social care under existing legislation, and

¹⁴ Stage 1 Report, para 16

¹⁵ Stage 1 Report, para 23

¹⁶ Stage 1 Report, para 17

we would welcome clarity as to how the proposed revised approach will differ from the existing position in real terms.

We note the lead committee's recommendations in relation to the proposed National Social Work Agency (NSWA).¹⁷ We also note that, on the basis that the policy intention is for the NSWA to be established within Government as part of the NCS structure, there is no separate provision for it on the face of the Bill.¹⁸ We would welcome clarity as to how the NSWA will ensure operational independence to be able to fulfil its role effectively. We would also welcome clarity on how the NSWA will relate to proposed and existing structures within the organisational landscape including the National Care Service Board, the Care Inspectorate, Audit Scotland and the Mental Welfare Commission.

Ultimately, the impact of a National Care Service on quality and consistency of health and social care in Scotland will depend on the details of implementation which are not yet available. It is important that these details- when available- are fully costed, evaluated and consulted upon. We note the calls in the Stage 1 Report for the Scottish Government to bring forward amendments to the Bill making appropriate provision for effective monitoring and evaluation of the National Care Service.¹⁹

Framework legislation and opportunities for parliamentary scrutiny

The Bill as introduced would create a framework for a National Care Service, with the detail to be delivered largely via subsequent secondary legislation.

Whilst we recognise that the aim of the Scottish Government's approach in bringing forward framework legislation is to allow for the creation of a National Care Service that is able to respond and adapt to developments in society via secondary legislation, we do have some concern regarding the lack of detail in the Bill as introduced.

The proposals constitute an enormous change across multiple aspects of health and social care services. These are critical services, and the scale and complexity of the proposals cannot be overstated. The Bill as introduced leaves a number of matters including data, employment implications and individual rights and responsibilities almost entirely to secondary legislation. These are high level issues based on fundamental rights and existing regulatory frameworks which will not change, regardless of the detail of delivery. These matters should be addressed in primary legislation to ensure full parliamentary scrutiny. We do not believe that this is inconsistent with the aim of ensuring responsiveness and adaptability via secondary legislation.

We are concerned that the approach adopted, whereby the Bill is scrutinised in advance of the co-design process, limits the potential for full and effective scrutiny at the stage of primary legislation as important details are not available.

¹⁷ Stage 1 Report, paras 68-71

¹⁸ Policy memorandum accessible (parliament.scot), para 73

¹⁹ Stage 1 Report, para 77.

We are also concerned that the Bill lacks detail regarding the structures for local delivery. As above, we would welcome clarification of the Scottish Government's revised approach in light of the consensus agreement with COSLA, and in particular details of proposed amendment to the Public Bodies (Joint Working) (Scotland) Act 2014 to clarify how the structures of the NCS will interact with the structures of the integration in a way which ultimately delivers improved quality and consistency in social care. . We note the call in the Stage 1 Report for the Scottish Government to give further consideration to how the Scottish Parliament will be accorded an appropriate ongoing scrutiny role with respect to the establishment and operation of the proposed National Care Service Board.²⁰ We would welcome further details of the structural models on the face of the Bill.

We note the lead committee's comments in the Stage 1 Report regarding the need for a reinforced role for the Scottish Parliament in undertaking regular, structured scrutiny of the implementation of the proposed National Care Service and the extent to which it is achieving its defined objectives.²¹ We further note the lead committee's call for the Bill to include provisions enabling the Scottish Government to keep the Scottish Parliament regularly updated on the operation of the NCS including, in particular, an assessment of the extent to which this is contributing to improved outcomes for those in receipt of social care.²² However, we remain of the view that fundamental aspects of the proposals should be included in primary legislation to ensure full parliamentary scrutiny.

Rights and duties

The Independent Review of Adult Social Care called for a shift in the paradigm of social care support to one underpinned by a human rights-based approach. Any new legislation relating to social care must contain clear and attributable rights and duties, and effective mechanisms for redress including legal redress. It must sit alongside and be integrated with work to incorporate human rights conventions. New legislation in this area must be based on and fully embed human rights principles, including the right to live independently and be included in the community as set out in Article 19 of the UN Convention on the Rights of Persons with Disabilities (UN CRPD), and must promote real and affective access to justice for service users and their families. It must be supported by transparent decision-making and robust complaints processes, and must promote accountability to service users. Accountability to Parliament is also a necessary component in creating a National Care Service.

We would welcome clarity on how the Bill will interact with the wider agenda of incorporating international human rights instruments into Scots law or with other law reform initiatives likely to impact on the future of social care legislation, such as the Scottish Mental Health Law Review.

It is not clear that the Bill as introduced will achieve the paradigm shift recommended by the IRASC. We have commented further in relation to specific provisions below.

²⁰ Stage 1 Report, para 25

²¹ Stage 1 Report, para 22

²² *ibid*

Consultation and co-design

We understand that the Scottish Government intends to develop the details of implementation for the NCS via a co-design process.²³ We welcome this commitment to ensuring that lived experience and the views of people who access and deliver social care are central to the development of the NCS.

However, beyond the section 1 principle that “services provided by the NCS are to be designed collaboratively with the people to whom they are provided and their carers”, there appears to be no statutory basis for this co-design process within the Bill, and consequently no statutory guarantee for the meaningful engagement of the full range of stakeholders in the co-design process. Further, there are many approaches to and understandings of ‘co-design’. We therefore welcome the suggestion in the Stage 1 Report that the Scottish Government should set out an overarching plan that includes a clear definition of co-design, parameters and intended outcomes of the co-design work and a timetable for its completion.²⁴

The Bill is a ‘framework bill’ which leaves much of the detail of the proposed National Care Service to co-design and secondary legislation. The detail is therefore of utmost significance in terms of realising the ambitions set out in the Policy Memorandum and the IRASC recommendations. It is vital that the development of that detail is subject to meaningful engagement with all stakeholders and the public, and to parliamentary scrutiny. It is not clear what safeguards are in place to ensure that co-design is meaningful, effective and timely and that Scottish Ministers are appropriately held to account by Parliament for the design and implementation of the NCS. Whilst we welcome the recommendation on the Stage 1 Report that the Scottish Parliament should be regularly updated on progress and outcomes of the co-design process²⁵ we remain concerned by the absence of statutory safeguards.

The Bill does impose various consultation duties. We welcome the consultation provisions in the Bill and have commented further on them below, but believe that they could be strengthened.

Resourcing

Any new approach to care and support must also be supported by adequate resourcing for the statutory, private and third sector organisations involved in delivery. Consideration should be given to whether efficiencies and economies of scale can be achieved by utilising existing structures and expertise within Local Authorities and Health Boards.

Conflicts of interest

There is a risk of conflicts of interest arising where too many functions are concentrated with one nationalised body, and consideration should be given to how those actual and perceived conflicts of interest could be mitigated.

²³ [National Care Service and co-design - gov.scot \(www.gov.scot\)](https://www.gov.scot/national-care-service-and-co-design)

²⁴ Stage 1 Report, para 9

²⁵ *ibid*

Comments on the Bill

Part 1- The National Care Service

Part 1 establishes the National Care Service.

Chapter 1- The principles and institutions of the National Care Service

Chapter 1 of Part 1 of the Bill provides the legal foundations for a National Care Service.

Section 1

Section 1 sets out the National Care Service principles.

The principles are very broadly drawn. It is not clear:

- to whom these principles are addressed and to what extent they are supported by attributable duties or mechanisms for accountability and enforcement.
- how they will interact with existing rights and duties, for example under the Equality Act 2010.
- how these principles will be measured or evaluated. It appears that significant discretion will be afforded to the Scottish Ministers.

We therefore welcome the lead committee's call in the Stage 1 Report for the Scottish Government to provide further detail on how adherence to the principles will be effectively monitored, evaluated and enforced as part of the creation of a National Care Service, including whether this would require additional provisions on the face of the Bill.²⁶

Section 2

Section 2 provides that Scottish Ministers will be responsible for the National Care Service.

Section 2(2) provides that "Everything that the Scottish Ministers do in discharging that duty is to be done in the way that **seems to them** to best reflect the National Care Service principles" [emphasis added].

It appears that significant discretion will be afforded to the Scottish Ministers.

²⁶ Stage 1 Report, at para 3

We note that the Minister has indicated to the lead committee that amendments will be required to sections 2 and 3 of the Bill to reflect the consensus agreement on shared legal accountability.²⁷

Section 3

Section 3 provides that Scottish Ministers are also responsible for arranging monitoring and improvement of the services that the National Care Service provides.

Again, it appears that significant discretion will be afforded to the Scottish Ministers.

As above, we note that the Minister has indicated to the lead committee that amendments will be required to sections 2 and 3 of the Bill to reflect the consensus agreement on shared legal accountability.

Section 4

Section 4 provides for the establishment and abolition of care boards. Scottish Ministers may establish and abolish care boards by regulations. Care boards may be responsible for particular geographical areas, or may be special care boards. Scottish Ministers must establish care boards which together cover the whole of Scotland, without overlap.

Regulations made under section 4 are subject to the affirmative procedure.

As above, we note the Scottish Government's decision to no-longer proceed with plans for the creation of local care boards and to retain integration authorities in a reformed state, alongside the creation of a National Care Service Board as part of a revised governance structure.²⁸

Section 5

Section 5 allows Scottish Ministers to provide financial assistance to care boards. This may include grants, loans, guarantees and indemnities.

Again, it appears that significant discretion will be afforded to the Scottish Ministers.

Chapter 2- Strategic planning

Chapter 2 of Part 1 makes provision for strategic planning functions for both Scottish Ministers and Care Boards.

We note that the lead committee anticipates that the Scottish Government will bring forward amendments which, under the revised governance model, will give the proposed National Care Service Board a defined

²⁷ Stage 1 Report, para 322

²⁸ Stage 1 Report, para 23

role in scrutinising strategic planning by integration authorities.²⁹ As above, we also understand that the Scottish Government no-longer intends to proceed with the establishment of Care Boards as part of the revised governance structure. We would welcome clarity on how strategic planning will be delivered in the proposed revised governance structure, and in particular on how any delay or uncertainty arising from further additional layers of governance will be mitigated.

Section 6

Section 6 deals with strategic planning by the Scottish Ministers.

Section 6(5) provides that Scottish Ministers must 'consult publicly' on any strategic plan made under section 6. There is no duty to specifically consult with people in receipt of care or unpaid carers. This would appear to be inconsistent with the overall policy aims. We would suggest that consideration should be given to strengthening any equivalent consultation requirements within the proposed revised governance structure should the Bill proceed to Stage 2.

Section 7

Section 7 deals with strategic planning by Care Boards. The content of the proposed plans in subsection 2 appears to be appropriate.

Section 8

Section 8 provides that Care Boards must, before making a strategic plan, consult in line with section 8(3) and then have a draft of the plan approved by Scottish ministers.

A Care Board consulting on a strategic plan in terms of section 8(3) must first seek views on the draft plan from community planning partners, and any local care boards whose area of responsibility borders its own, and- having taken those views in to account- thereafter must seek views from local residents or, in the case of a special care board, the public in Scotland. There is no duty to take the views of local residents or the public in Scotland into account in preparing the draft plan. There is no duty to specifically consult with people in receipt of care or unpaid carers. This would appear to be inconsistent with the overall policy aims. We would suggest that consideration should be given to strengthening any equivalent consultation requirements within the proposed revised governance structure should the Bill proceed to Stage 2.

Section 9

Section 9 makes provisions regarding the frequency of planning by care boards.

²⁹ Stage 1 Report, para 28

Section 10

Section 10 is an interpretation section relating to the meaning of 'ethical commissioning strategy' in this chapter.

We note the comments within the Stage 1 Report recommending a clear and comprehensive definition of 'ethical commissioning'.³⁰ We would welcome further clarity about what is meant by an 'ethical commissioning strategy' and how it complies with the principles in section 1 of the Bill as introduced.

Chapter 3- Information and support

Chapter 3 of Part 1 relates to information and support.

Section 11

Section 11 of the Bill makes provision for a National Care Service Charter.

The Bill provides that the proposed charter will contain a summary of rights and responsibilities in relation to the National Care Service, and "a description of the processes available for upholding the rights in relation to the National Care Service of the persons whose rights and responsibilities the charter summarises". However, the Bill provides that nothing in the charter will give rise to new rights, impose any new responsibilities, or alter existing rights and responsibilities. It is not clear what is meant by 'rights' in this context, and further detail is required as to whether this covers the full range of rights under international human rights obligations, Convention rights, or other rights created by existing domestic legislation. It is not clear whether the charter will have any legal status, or what processes- if any- will be available for enforcing the rights set out in the charter. We would welcome further detail on how the proposed Charter will provide accountability to those accessing support and empower them to claim their care-specific rights as per the Policy Memorandum³¹ in a meaningful way.

Section 12

Section 12 makes further provisions about the National Care Service charter.

Section 12(1) requires Scottish Ministers to consult "any person they consider appropriate" when preparing and reviewing the National Care Service charter. There is no specific duty to consult with people accessing care and support, unpaid carers or those providing services, although there is a duty to have particular regard to the importance of eliciting the views of individuals to whom the NCS provides services, and persons who provide services on behalf of the NCS. There is no duty to report to Parliament on the

³⁰ Stage 1 Report, para 29

³¹ Policy Memorandum, para 118

findings of any consultation, or the way in which it has been carried out. In our view the provision on consultation should include these safeguards.

We note the comments in the Stage 1 Report regarding the potential for a reinforced role for the Parliament in undertaking ongoing scrutiny of the Charter. We would welcome further clarity regarding this proposed role should the Bill proceed to Stage 2.

Section 13

Section 13 allows Scottish Ministers to make regulations regarding the provision of independent advocacy services in connection with the services that the National Care Service provides.

Regulations made under section 13 are subject to the affirmative procedure. We note the comments in the Stage 1 Report regarding the possibility of reinforcing the scrutiny role of the Parliament in respect of the exercise of these powers through the use of a different procedure.³²

Section 14

Section 14 makes provision for a 'complaints service' which will be responsible for receiving complaints and passing complaints on to the appropriate person.

It is not clear how this provision will meet that IRACS recommendations, specifically recommendation 9 regarding rapid recourse to an effective complaints system and redress. Nor is it clear whether this will be a new, standalone complaints service or whether it will fall within the remit of layers of existing public services complaints provision.

Section 15

Section 15 allows Scottish Ministers to make regulations providing for the handling of complaints about services provided by the National Care Service and any other social service as defined by section 46 of the Public Services Reform (Scotland) Act 2010.

Regulations made under section 15 are subject to the affirmative procedure. We note the recommendation in the Stage 1 Report that these provisions be made subject to a procedure that would enable a further enhanced level of parliamentary scrutiny than is offered by use of the affirmative procedure.³³

Section 15(3)(b) of the Bill allows Scottish Ministers to make regulations which create civil or criminal sanctions for non-compliance. It is essential that any Regulations creating sanctions are subject to appropriate parliamentary scrutiny and that individuals subject to the regulations are aware of an able to understand the scope of the sanctions and modify their behaviours accordingly.

³² Stage 1 Report, para 37

³³ Stage 1 Report, para 42

Chapter 4- Scottish Ministers' powers to intervene

Chapter 4 of Part 1 sets out Scottish Ministers' powers to intervene in relation to care boards and contractors.

We note the comments in the Stage 1 Report regarding the potential for Scottish Government amendment to this Chapter, should the Bill proceed to Stage 2.³⁴

Sections 16-19

We have no specific comments on these sections at this stage.

Section 20

Section 20 makes provisions Scottish Ministers to apply to a court to make an emergency intervention order where they are satisfied that the criteria in section 21(1) are satisfied.

These powers would allow Scottish Ministers to intervene in agreements with third parties, where there is no contractual relationship, and where the contract relates not only to services provided on behalf of the NCS, but also those provided to the NCS. These are wide-ranging powers. We would welcome further detail on why the provisions are required to address current deficiencies: failures by contractors including care providers are currently commonly dealt with under contractual provisions and there is a risk that an additional court process may simply add further regulation and the potential for delay. It is not clear how the intervention powers will interact with existing contractual provisions, and the normal law of contract. It is not clear who is to bear any extra cost resulting from any more onerous obligation imposed under an intervention order. It may be appropriate for legislation to set out steps which should be taken prior to an application being made to the court to ensure that the order sought would be factually capable of performance and that performance would be lawful.

Section 21

Section 21 makes further provisions relating to applications emergency intervention orders.

It may be appropriate for a 'failure' in terms of section 21 to be defined by reference to existing standards such as regulated care or financial standards.

Section 22

Section 22 makes provision for variation and revocation of emergency intervention orders. We have no comments on this section at this stage.

³⁴ Stage 1 Report, paras 43- 45

Chapter 5- Functions connected to the provision of care

Chapter 5 of Part 1 makes provisions for Scottish Ministers and care boards to carry out functions connected to the provision of care.

Section 23

Section 23 provides for Scottish Ministers and care boards to carry out functions in relation to research relevant to the services that the NCS provides.

We note the Scottish Government's stated intention, via amendments, to transfer the research and training functions set out in sections 23 and 24 of the Bill as introduced to the proposed National Care Service Board.³⁵ We would welcome clarity on how these proposed functions will interact with the existing organisational landscape.

Section 24

Section 24 provides for Scottish Ministers and care boards to carry out functions relating to training for individuals to equip them with knowledge and skills relevant to providing services on behalf of the National Care Service.

As above, we note the Scottish Government's stated intention, via amendments, to transfer the research and training functions set out in sections 23 and 24 of the Bill as introduced to the proposed National Care Service Board.³⁶

Section 25

Section 25 provides for Scottish Ministers and care boards to give financial assistance to those engaged in activities connected to the services provided to individuals by the National Care Service.

We note the Scottish Government's intention, via amendments, to transfer the functions set out in section 25 of the Bill as introduced from Scottish Ministers to the proposed National Care Service Board.³⁷

Section 26

Section 26 allows Scottish Ministers or care boards to compulsorily acquire land.

We note that the Stage 1 Report anticipates that the Scottish Government may bring forward amendments to these provisions should the Bill proceed to Stage 2.³⁸

³⁵ Stage 1 Report, para 46

³⁶ Stage 1 Report, para 46

³⁷ Stage 1 Report, para 53

³⁸ Stage 1 Report, paras 56 and 57

Chapter 6- Allocation of care functions etc

Chapter 6 of Part 1 relates to allocation of care functions and the transfer of people and property in consequence of functions being transferred.

We note that the Scottish Government has indicated that, under the new consensus agreement with COSLA, local government will retain functions, staff and assets and, as a consequence, the provisions in sections 27-29 will no longer be required.³⁹

We note, however, the Scottish Government's intention to make alternative provision for functions to be transferred between statutory partners if there is a rationale and clear local agreement to do so.⁴⁰ We would welcome further clarity on these proposals.

We welcome the comments in the Stage 1 Report regarding the importance of ensuring absolute clarity around the scope of functions to be transferred and of undertaking proper prior consultation with those potentially affected.⁴¹ Consultation should expressly include people accessing care and support and unpaid carers, as well as public and third sector stakeholders and service providers.

Sections 27-29

We have no specific comments on these sections at this stage.

Section 30

Section 30 provides that Scottish Ministers must consult publicly before transferring children's and justice services into a National Care Service.

As above, we note the Scottish Government's proposed change of approach to transfer of services.

We are concerned that the definitions of "a children's service" (section 30(4)) and "a justice service" (section 30(5)) in the Bill as introduced are very wide and are made without reference to existing legislative provisions. Should these provisions be retained in the Bill, we recommend that they are reviewed to ensure that they are workable in practice. We also note that section 30(5) excludes any service provided in exercise of a function conferred by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 from the definition of justice services. Such services are not similarly excluded from the definition of "a children's service". The purpose of this exclusion and apparent disparity is unclear, and may be difficult to operate in practice.

³⁹ Stage 1 Report, para 59

⁴⁰ Stage 1 Report, para 59

⁴¹ Stage 1 Report, para 60

We welcome the statutory commitment to further consultation on any transfer of children's and justice services (section 30(2)). As above, we would welcome further strengthened consultation provisions throughout the Bill, and in particular in relation to the transfer of functions.

Section 31

Section 31(1) provides that Scottish Ministers may by regulations transfer individuals from the employment of the original function holder into the employment of the new function holder and that a transfer effected by virtue of this subsection is a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

Regulations made under section 31 are subject to the negative procedure.

In our written evidence, we highlighted a number of concerns with this section of the Bill as introduced. We note the Scottish Government's change in approach regarding the transfer of staff, property and liabilities from local government to the proposed National Care Service.⁴² We look forward to seeing further detail of the revised approach to governance and accountability should the Bill proceed to Stage 2.

Section 32

Section 32 provides that, in connection with a transfer of a function from one person to another, the Scottish Ministers **may** [emphasis added] transfer property and liabilities to the new function holder.

Regulations made under section 32 are subject to the negative procedure.

In the Bill as introduced, Scottish Ministers are afforded significant discretion and it is not clear what safeguards are in place to protection continuity of care for service users and to protect function holders who may have entered into contacts relating to functions which they no-longer hold. As above, we note the proposed change in approach to the transfer of staff, property and liabilities from local government to the proposed National Care Service.

Section 33

Section 33 relates to interpretation of expressions about functional transfers under this Chapter. We have no specific comments on this section at this stage.

Chapter 7- Final provisions for Part 1

Chapter 7 of Part 1 makes final provisions for this part of the Bill. We have no specific comments on this chapter at this stage.

⁴² Stage 1 Report, para 66

Part 2- Health and social care information

Part 2 of the Bill relates to health and social care information.

This part of the Bill is very short, but has the potential to give rise to significant privacy implications. The Bill and supporting documents lack detail as to how effective information sharing will be achieved in practice against the complex background for health and social care. There is a lack of detail as to the safeguards which will be in place to protect confidentiality of sensitive information, and to ensure consistency with the professional obligations of medical and health care staff. Consultation with professional bodies will be required.

There appears to be an assumption that transferring responsibilities to Scottish Ministers will result in any corresponding information also transferring to Scottish Ministers, but it is not clear that this will in fact be the case. There is a distinction between creating the legality of a transfer, and the practical transfer of information. The latter requires to be properly resourced in order to achieve the potential benefits to those receiving care and support. It also requires to be achieved in a way which is consistent with wider approaches to data in health and social care.⁴³ Whilst we note the proposed change of approach to transfer of services, we still consider that careful consideration must be given to how information is managed within the proposed new governance structure. We therefore welcome the calls within the Stage 1 Report for further clarification on the privacy and cost implications of Part 2 of the Bill.⁴⁴

Consideration should also be given to how information can be shared in cross-border situations, particularly cross-border within the UK. This will be particularly relevant for those who live in areas of Scotland which border England and who may need to receive some aspects of health and social care in England.

Section 36

Section 36 allows Scottish Ministers to make regulations for a scheme that allows information to be shared so that services can be provided efficiently and effectively by or on behalf of the National Care Service and the National Health Service.

Section 36(2)(b) of the Bill allows Scottish Ministers to make regulations which create civil or criminal sanctions for non-compliance. It is essential that any Regulations creating sanctions are subject to appropriate parliamentary scrutiny and that individuals subject to the regulations are aware of an able to understand the scope of the sanctions and modify their behaviours accordingly.

⁴³ See for example the recent Scottish Government consultation: [Data Strategy for health and social care - Scottish Government - Citizen Space \(consult.gov.scot\)](https://www.consult.gov.scot)

⁴⁴ Stage 1 Report, paras 73 and 74

Regulations made under section 36 are subject to the affirmative procedure. We note the comments in the Stage 1 Report that the regulation-making powers conferred by section 36 must be subject to a further reinforced process of parliamentary scrutiny than is currently afforded by use of the affirmative procedure.⁴⁵

Section 37

Section 37 provides for Scottish Ministers to produce an information standard and make it publicly available. We have no further comments on this section at this stage, in addition to our general comments on this Part of the Bill above.

Part 3- Reforms connected to delivery and regulation of care

Part 3

Part 3 of the Bill makes provisions for reforms connected to the delivery and regulation of care.

Sections 38 and 39

We have no specific comments on these sections at this stage.

Section 40

Section 40 modifies the Public Services Reform (Scotland) Act 2010 to allow Scottish Ministers to issue 'visiting directions' to providers of care home services.

Before making such a direction, Scottish Ministers must consult with Public Health Scotland and any other person the Scottish Ministers consider appropriate.

These provisions make provision for 'Anne's Law'. We responded to the Scottish Government consultation on Anne's Law in November 2021.⁴⁶ We highlighted that in our view, the aim of Anne's Law should be to allow adults living in care homes to effectively claim their existing rights, and to ensure that those rights are restricted only in exceptional circumstances and in a way that is proportionate and non-discriminatory in according with national and international human rights law.

Section 41

Section 41 of the Bill as introduced modifies the Public Contracts (Scotland) Regulations 2015 to allow contracts for NCS services to be reserved to certain types of organisation. It does this, in the spirit of the European Union (Continuity) (Scotland) Act 2021 by introducing a new Regulation 76A that draws upon article 77 of EU Directive 2014/24/EU.

⁴⁵ Stage 1 Report, para 75

⁴⁶ [21-11-02-ppc-annes-law-consultation.pdf \(lawscot.org.uk\)](https://www.lawscot.org.uk/21-11-02-ppc-annes-law-consultation.pdf)

This effectively acknowledges international obligations of the United Kingdom under not only the Agreement on Government Procurement (AGP) but also related provisions of the Trade and Co-operation Agreement between the UK and the EU. Similarly, for the World Trade Organization's Agreement on Subsidies and Countervailing Measures.

It should be noted that where provision is to be sourced from an entity with particular social characteristics, subcontracting should not be allowed to bypass the requisite characteristics.

It should also be noted that the EU had produced detailed material about the process of procurement (or, instead of procurement, "entrustment") of social services in the general interest.⁴⁷

Section 42 and Section 43

Sections 42 and 43 make provisions about regulation of social services.

Decisions to close services may be made without serving an improvement notice. Exercise of this power may lead to costly judicial reviews.

We recommend that legislation sets clear parameters for use of these powers.

Part 4- Final Provisions

Sections 44 and 45

We have no specific comments on these provisions at this stage.

Section 46

Section 46 relates to regulation-making powers.

Where we have specific comments on the regulation-making powers within the Bill, we have commented on them above.

We note the recommended changes to the regulation-making powers set out in section 46 of the Bill in the Stage 1 Report.⁴⁸ We also note the suggestion that the regulation-making powers of the Bill and of any regulations made using these powers should be reviewed within 3 years of each of the corresponding

⁴⁷ See COMMISSION STAFF WORKING DOCUMENT "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest 15.2.2013 SWD(2013) 53 final https://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf

⁴⁸ Stage 1 Report, para 99

provisions coming into effect.⁴⁹ Should this approach be adopted, we would welcome further clarification on how this would work in practice.

Sections 47 and 48

We have no specific comments on these provisions at this stage.

For further information, please contact:

Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk

⁴⁹ Stage 1 Report, para 101

